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NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD PHILPOT,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

1. Whether the interstate commerce requirement of a Hobbs Act prosecution can be satisfied by the activities of a corporation which is conducting activities which are criminal and wholly illegal under the relevant state laws regulating credit unions and their promotion.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, DONALD PHILPOT, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in tis proceeding on April 13, 1983.

CITATION TO OPINION BELOW

The opinion in the United States Court of Appeals for the Fifth Circuit in this case is cited as United States vs. Philpot. The opinion is not reported but appears herein as Appendix A.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 13, 1983. This Petition for Certiorari was filed within sixty days of that date in accordance with Rule 20.1 of the Rules of the Supreme Court of the United States. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

As provided by Supreme Court Rule 21.1(f), the verbatim quotation of the following Statutes are set forth in Appendix B hereto:

Article 2461-2.07 of the Texas Revised Civil Statutes and Title 6, Oklahoma Statutes, Section 2005.

STATEMENT OF THE CASE

The Petitioner was indicted on two counts charging violations of 18 U.S.C. §§1951 and 1952. By pre-trial motion, counsel for Petitioner moved to dismiss the indictment. The Government agreed to strike the last sentence of paragraph one of the count charging the §1951 violation. Following a jury trial on that count only, Petitioner, business agent for Local 111 of the Baker's Confectionary and Tobacco Union, was convicted of attempting to extort $15,000 from a company called Credit Union Promotions, Inc., thereby affecting interstate commerce. On August 30, 1982, Petitioner was sentenced to five years in the custody of the Attorney General and Count Two was dismissed. Notice of Appeal was filed by Petitioner on the third day of September,

1982. The Judgment of the Fifth Circuit of Appeals was entered on the thirteenth day of April, 1983, in an opinion authored by Judge Tate affirming the conviction. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

The Petitioner, on appeal, contended that the interstate commerce requirement of the Hobbs Act was not satisfied by the proof at trial since the only effect on interstate commerce would come from the activities of a business which was conducting itself in violation of various states' laws regulating credit unions, their registration and promotion. Thus, the activities of the victim were wholly illegal and criminal. The Court of Appeals for the Fifth Circuit rejected the Petitioner's position and ruled that under Texas law a corporation which has not obtained a license to do business in Texas

nevertheless retains some legal effect and that reason alone is sufficient to support the interstate commerce requirement of the Hobbs Act prosecution. The panel opinion did not address the Texas law which made the activities of the alleged victim of the extortion, Credit Union Promotions, Inc. (hereinafter referred to as "C.U.P."), illegal. C.U.P. was headquartered in Tulsa, Oklahoma. The firm had only one client, Bakem Credit Union (hereinafter referred to as "Bakem"), which was headquartered in North Little Rock, Arkansas. C.U.P.'s activities were directed at promoting enrollment in Bakem.

Prior to trial, Petitioner's counsel filed a Motion to Dismiss the Indictment on the interstate commerce defect noted

above. An affidavit filed in support of that motion contained a copy of a record from the Texas Secretary of State which showed that C.U.P. was not authorized to transact business in Texas and a letter from the Arkansas Securities Department which showed that Bakem could not have members in Texas. After trial Petitioner filed a Motion in Arrest of Judgment in which this argument was again raised. In support of this position, he submitted the above documents again, as well as an official record of the Oklahoma State Banking Department which showed that Bakem was never authorized to do business in Oklahoma as well as a letter from the Deputy Commissioner of the Oklahoma State Banking Department stating that Bakem had never been given a Certificate of Authority as required by the Oklahoma law regulating credit unions. There was no

evidence that Bakem or C.U.P. had complied with the Texas law regulating the conduct of any organization which was a credit union or was promoting the same. Relevant laws of Oklahoma and Texas make the non-compliance a criminal act. By Order dated July 26, 1982, the trial court overruled the Petitioner's Motion in Arrest of Judgment.

This court has never considered whether or not the Hobbs Act applies to the activities of a wholly illegal business such as the victim in this case. No Court of Appeals prior to the decision of this case had considered this issue. As the Seventh Circuit has observed, "[t]he Defendant and the Government agree that no authority indicates whether the Hobbs Act applies to wholly illegal business." United States v. Blakey, 607 F.2d 779, 783 (7th Cir. 1979).

REASONS FOR GRANTING CERTIORARI

The decision of the Fifth Circuit of Appeals in holding that the activities of a wholly illegal business satisfied the interstate commerce requirement of a Hobbs Act prosecution constitutes an important interpretation of the Hobbs Act never before considered by the Supreme Court.

As this Court has recognized,

> "[t]here are two essential elements of the Hobbs Act crime: interference with commerce and extortion. Both elements have to be charged. Neither a surplusage and neither can be treated as a surplusage. The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of the crime rests only on that interference."

Stirone v. United States, 361 U.S. 212, 218 (1960). Clearly then, failure on the part of the Government to be able to prove the interstate commerce element mandates reversal of the conviction.

Persuasive policy considerations dictate that a business engaged in the carrying on or promotion of a credit union like the victim in Petitoner's case be held strictly accountable to compliance with applicable state law regulating this type of business. The nature of a credit union's function is much like a bank. It is a depository and safekeeper of money. The various states should be left free to demand compliance with the laws whih they have enacted regarding these activities. A business who chooses to disregard these regulatory laws and conduct its business illegally and in a criminal way cannot as a matter of law have activities which satisfy the interstate commerce requirement of the Hobbs Act.

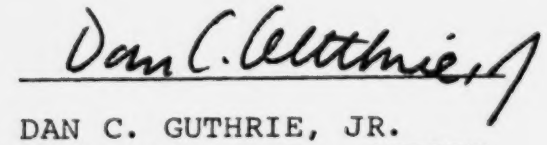
As noted, the Court of Appeals for the Fifth Circuit completely ignored the Texas regulatory scheme governing credit unions

and their promotion in that state. It also did not address the fact that under the relevant state laws failure to comply with the statutes constitutes a criminal act. Thus, Petitioner submits that the commerce requirement of the Hobbs Act was not satisfied at trial and prosecution of Petitioner, if any, should be left to applicable Texas state law.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,



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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Petition for Writ of Certiorari was mailed to Mr. Richard Stephens, Assistant United Stateds Attorney, 1100 Commerce Street, Dallas, Texas 75242 and to Mr. Wade Hampton McCree, Jr., Solicitor-General, Department of Justice, Suite 5143, Ninth and Constitution Avenue, N.W., Washington, D.C. 20530, on this the 31st day of May, 1983.

Dan C. Guthrie Jr.
DAN C. GUTHRIE, JR.

A-1

UNITED STATES of America
Plaintiff-Appelle,
v.
Donald PHILPOT

No._____

United States Court of Appeals
Fifth Circuit

April 13, 1983

Before RUBIN and TATE, Circuit Judges, and DAVIS*, District Judge.

TATE, Circuit Judge:

The Defendant, Philpot, appeals from his conviction, under 18 U.S.C. §1951 (the Hobbs Act), of attempted extortion. The indictment alleged that he requested $15,000 from the victim company for his approval and assistance in a business solicitation enterpise, and threatened both physical and economic harm if the money was not paid. Philpot raises four contenions on appeal that, for the following rasons, are rejected as unpersuasive:

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*District Judge of the Western District of Louisiana, sitting by designation.

Philpot initially contends that reversible error occurred when evidence was admitted of prior wrongful or violent acts done by him, without any limiting instruction. Various witnesses-- officers and employees of the victim company-- testified to statements made to them by Philpot of his past violent and illegal conduct. No objection was made to this testiony, and no cautionary instruction to the jury was requested.

Thus, the alleged error in the admission of this evidence was waived by the failure to raise timely objection at the time, Fed. R. Evid. 103(a)(1), unless the admission of the statements constituted "plain errors affecting substantial rights" Id. 103(d). We doubt that, in the context of the entire record, the admission of the statements, even if tenuously inadmissible, had any effect on the verdict or could otherwise meet even threshold tests of "plain error".

However, even if objection had been raised before the trial court, it would properly have been overruled.

In contending inadmissibility, Philpot relies on Rule 404(b), which prohibits evidence of extraneous crimes, wrongs, or acts to prove the characteer of the accused in order to show that he committed the present offense for which he is on trial Here, however, the allegedly objectionable evidence were non-hearsay out-of-court admissions of a party (the defendant Philpot) offered by his opponent (the prosecution), Fed. R. Evid. 801(d)(2), for a relevant purpose, Id., Rules 401, 402.

Statements by a defendant to his intended extortion victims have been held admissible by this court, not only as non-hearsay, but also as tending to prove the defendant's inducement of a fearful state of mind on the part of his victims (an essential element of a Hobbs Act conviction). United States v. Lynn, 608 F.2d 131, 135 (5th Cir. 1979); United States v. Nakaladski, 481 F.2d 289, 301 (5th Cir.) cert. denied, 414 U.S. 1064, 94 S.Ct. 570 (1973). Statements by Philpot in this case to witnesses tht he enjoyed "strong-arming" and "ripping people off", that he had rigged an election, and that he had been in prison were not admitted to show his bad character or to show that he had in fact done these acts. They were introducted, rather, to show his attempts to instill a fearful state of mind in his victims, or to induce them to cooperate in accordance with his threats, when he made these statements to them.

Philpot next contends that another prerequisite of a Hobbs Act conviction was not met in this case-- that the actions of the defendant affect interstate commerce. Stirone v. United States, 361 U.S. 212, 218, 80 S.Ct. 270, 274 (1960). Philpot argues that because the Oklahoma-based victim company was not authorized to do business under Texas law, any extortionate attempts on its "illegal" businss operations in Texas would not affect Interstate Commerce.

We doubt that the circumstance relied upon affects the "interstate" aspect of the business against which the extortion was directed. Nevertheless, Texas law

provides that the acts of a corporation that has not obtained a *license to do* business nonetheless retain legal effect, Tex. Bus. Corp. Act Art. 8.18 (1955), and for this reason alone, this legitimate aspect of the company's business is sufficient to support the commerce requirement of a Hobbs Acts conviction, see United States v. Blakey, 607 F.2d 779, 782-83 (7th Cir. 1979). Philpot's contention on this issue is therefore rejected.

Philpot argues, thirdly, that a fatal variance exists between the indictment in this case and the proof adduced at trial so as to require reversal of his conviction. He contends that while the indictment alleged an extortionate attempt against one company, Credit Union Promotions, Inc., the evidence shows, if anything, an extortionate attempt against another, Bakem Credit Union. The evidence clearly indicates, however, that the individuals who were threatened in this case were working on behalf of both companies. In fact, the individuals to whom the threats were primarily directed were the president and a part owner of Credit Union Promotions, Inc., the company name in the indictment.

The requirement that the proof adduced at trial correspond to the allegations of an indictment insures that (1) the defendant will be adequately informed of the charges to prepare his defense without surprise at trial; and (2) the defendant will not be subject to another prosecution for the same offense. Berger v. United States, 295 U.S. 78, 82, 55 S.Ct. 629, 630 (1934). Philpot, in this case, suffered no surprise, and there is no showing of

any reasonable danger of a second prosecution. His claim of variance, therefore, if indeed there was variance, is rejected. See United States v. Duhon, 565 F.2d 345, 355 (5th Cir.) cert. denied, 435 U.S. 952, 98 S.Ct. 1580 (1978). Cf. United States v. Stirone, supra, 361 U.S. at 215-19, 80 S.Ct. at 272-74.

Finally, Philpot challenges the sufficiency of the evidence to support his conviction. This contention also is without merit. Looking at the evidence in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469 (1942), there is ample evience upon which the jury could have concluded that Philpot requested $15,000 from Credit Union Promotions, Inc., while simultaneously instilling fear through threats of both physical and economic harm, if such payment was not made. In addition, there is ample evidence to th effect that the extortion, had it succeeded, would have affected interstate commerce.

Conclusion

Accordingly, we AFFIRM the judment of the district court convicting Philpot and sentencing him to five years in prison for the attempted extortion.

AFFIRMED.

Article 2461-2.07 of the Texas Revised Civil Statutes and provides as follows:

"No person, corporation, partnership, or association of credit unions organized under this Act or the Federal Credit Union Act, may use a name or title containing the words 'credit union' or any derivation thereof, represent itself as a credit union, or conduct business as a credit union. Violation of this section constitutes a misdemeanor punishable by a fine of not more than $5,000, or confinement in jail for not more than two years, or both."

Title 6, Oklahoma Statutes, Section 2005 provides as follows:

"It shall be unlawful for any individual, firm, association, or corporation to transact a Credit Union business except as authorized by the laws of the State of Oklahoma or the United States, or to use or advertise in connection with any business, other than the Credit Union business conducted under the laws of this State or of the United States, the term 'Credit Union', or any other term or terms calculated to ddeceive the public into believing that such person, firm, association, or corporation is engaged in the Credit Union business. Any person, firm, association, or corporation violating any of the provisions of this section, either individually or as an interested party, in any firm, association, or corporation shall be guilty of a misdemeanor, and upon

conviction thereof, shall be fined in a sum of not less than one hundred (100) dollars, nor more than five hundred (500) dollars, or by imprisonment in the County jail for not less than thirty (30) days, nor more than six (6) months, or by both such fine and imprisonment, and it is hereby made the duty of the Attorney General to enforce the provisions of this Section; and in order to prevent the violation of this Section, the District Court in the County wherein said Credit Union is located is hereby authorized and empowered to grant an injunction and to appoint a receiver to take charge of the business and assets of any person, firm, association, or corporation found guilty of violating the provisions of this Section, and to make all necessary and proper orders to wind up such business and prevent a violation of this Section. Laws 1941, p.12, §5."